IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 383 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)

Versus

KOLI DHARMASHI SHAMA – Respondent (s)

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Appearance :
MR KP RAVAL APP for Appellant
MR SUNIL C PATEL for Opponent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT
Date : 04/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The acquittal of the respondents ('the accused' for short) of the offence punishable under Sections 302, 147, 148, 149, 323 and 325 of the Indian Penal Code ('IPC' for short) recorded

by the learned Additional Sessions Judge, Bhavnagar, vide judgment and order dated 23.12.1985 rendered in Sessions Case No.81 of 1984 is the subject matter of challenge in instant appeal, which is filed under Section 378 of the Code of Criminal Procedure ('the Code' for short) by the appellant, State of Gujarat.

2. At the outset, it is pertinent to mention that in all five persons were charged and tried for the offence as enumerated above. The trial court acquitted all the five accused persons of all the charges against which the State of Gujarat has preferred instant appeal challenging the judgment and order of acquittal.

3. The appeal was placed for admission hearing before a Division Bench of this Court. The Division Bench vide order dated 10.7.1986 granted leave to appeal in respect of only two accused and accordingly the appeal was admitted only

against accused No.1, Koli Dharmashi Shama and accused No.5, Koli Mavji Shama. So far as accused Nos.2, 3 and 4 are concerned, the appeal was dismissed at the admission stage. It is further pertinent to mention that during the pendency of instant appeal, accused No.5, Koli Mavji Shama passed away and, therefore, the appeal against him stood abated.

4. The order dated 10.7.1986 passed by the Division Bench of this Court at the time of admitting the appeal is set out herein below:

> “Leave granted. Appeal admitted against respondent No.1, Koli Dharmashi Shama and respondent No.5, Koli Mavji Shama. Bailable warrants to issue against respondents Nos.1 and 5 in the sum of Rupees two thousand each, with one surety.
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> Appeal dismissed at the admission stage against respondent No.2, Koli Parshottam Mulji, respondent No.3, Koli Vitthal Mulji

and respondent No.4, Koli Jeram Mashru. At the instance of Mr. D.K. Trivedi, APP we are not assigning our reasons for confirming the judgment of acquittal regarding the respondents Nos.2, 3 and 4.

No orders on the Criminal Revision Application No.142 of 1986".

5. It is also pertinent to mention that above mentioned order of dismissal of appeal at admission stage against accused Nos.2, 3 and 4 was not challenged by the State of Gujarat in higher forum, therefore, the said order has become final.

6. The prosecution case, as disclosed from FIR and unfolded during trial, was that:

6.1. On 9.5.1986, Savitaben Gagjibhai Punabhai, P.W.4, lodged a First Information Report at "A" Division Police Station, Bhavnagar against the

accused for commission of offences punishable under Sections 147, 148, 149, 323, 325, 326 and 307 of the IPC which was registered vide CR No.I-62 of 1984. As per the allegations made in the FIR, the complainant Savitaben happens to be widow of deceased Gagjibhai Punabhai Koli. On 9.5.1984 at about 5 P.M. the complainant, her husband Gagjibhai and her mother-in-law were at home. At that time Gagjibhai saw a boy named Ghanshyam, son of A-1, Koli Dharmashi, was cutting the bushes on the hedge and for that act of Ghanshyam, Gagjibhai reprimanded him. Ghanshyam at that time started abusing Gagjibhai. Gagjibhai told Ghanshyam to go away from that place otherwise he would be beaten. When this altercation between Gagjibhai and Ghanshyam was going on, mother of Ghanshyam, Tabuben came over there and she in turn informed about it to her husband, i.e., A-1 - Koli Dharmashi Shama. Dharmashi called for four persons named Parshottam Mulji (original accused No.2), Vitthal

Mulji (original accused No.3), Jeram Mashru (original accused No.4) and Mavji Shama (original accused No.5) and in response to the call, they all, armed with deadly weapons, forcefully entered in the court-yard of the house of the Gagjibhai. It was the case of the prosecution that A-1, Koli Dharmashi had a dharia in his hand and with it he inflicted a blow on the head of Gagjibhai Punabhai. It was the case of the prosecution that Savitaben was also assaulted with a stick by original accused No.5, Koli Mavji Shama, injuring her on her head, wrist and ear. It was also the case of the prosecution that other persons over there i.e., original accused Nos.2, 3 and 4 also had sticks in their hands and they were party to the assault. Immediately thereafter many persons from the neighbourhood came down at the scene of the offence and saved Savitaben and her husband from further assault. Thereafter injured Savitaben and her husband were put in a car and were taken for medical treatment

as they had sustained serious injuries. Savitaben was admitted in Ward No.9 whereas her husband Gagjibhai was admitted in Ward No.8 in Sir T. Hospital.

6.2. The motive behind this incident as alleged by the prosecution was that on the day of the incident, in the evening, deceased Gagjibhai saw Ghanshyam, son of Koli Dharmashi, cutting the bushes on the hedge. Gagjibhai reprimanded Ghanshyam for this act which was not liked by the accused persons.

6.3. On 9.5.1984 i.e., on the day of the incident, Gagjibhai was brought to Sir T. Hospital, Bhavnagar for treatment and thereafter on 16.5.1984 he was transferred to Civil Hospital, Ahmedabad for further treatment. On 18.5.1984 Gagjibhai succumbed to the injuries. Accordingly, charge of murder punishable under Section 302 of IPC was added in the complaint lodged by

Savitaben.

6.4. During the course of investigation, the Investigating Officer recorded statement of witnesses, drawn panchnama of scene of offence, held inquest on the dead body of Gagjibhai Punabhai and thereafter the dead-body was sent for post-mortem, collected autopsy report and as sufficient incriminating evidence against the accused was found, they came to be charge-sheeted in the Court of learned JMFC, Vallbhipur, Umrara, who committed the case to the Court of Sessions of Bhavnagar District as the offence punishable under Section 302 of IPC alleged against the accused is exclusively triable by the Court of Sessions.

6.5. On committal, the case was made over for trial to the learned Additional Sessions Judge, Bhavnagar who framed necessary charge against the accused vide Ex.5 on 22.5.1985 which was read

over and explained to them. The accused pleaded not guilty to the charge and claimed to be tried. Thereupon the five accused were put to trial in Sessions Case No.81 of 1984.

6.6. In order to bring home the charge levelled against the accused, the prosecution examined as many as 13 witnesses and relied upon their oral testimony, the details of which have been given in para 3 of the impugned judgment and order. They are as under:-

(i) P.W.1, Ladji Jibhai Malek (Panch Witness), Ex.15.

(ii) P.W.2, Jitendrabhai Mohanbhai Ardhvariyu, Medical Officer, Sir T. Hospital, Bhavnagar, Ex.17.

(iii) Rameshbhai Dhanjibhai, Panch Witness, Ex.23.

(iv) P.W.4, Savitaben Mohanbhai, first informant, widow of deceased Gagjibhai, Ex.34.

(v) P.W.5, Ambaben Devjibhai, mother of deceased Gagjibhai, Ex.36.

(vi) P.W.6, Nanjibhai Naranbhai, Panch witness, Ex.37.

(vii) P.W.7, Savitaben Ravjibhai, neighbour, Ex.41.

(viii) P.W.8, Duda Bhagwan, neighbour, Ex.42.

(ix) P.W.9, Tarsibhai Karamsibhai, neighbour, Ex.43.

(x) P.W.10, Vashrambhai Chhaganbhai, neighbour, Ex.44.

(xi) P.W.11, Dayaldas Madhavdas Lashkari, Head Constable 'A' Division, Bhavnagar Police Station, Ex.46.

(xii) Dr. Rathindra Bala Saheb Deshmukh, Medical Officer, who performed the post-mortem of the deceased at Civil Hospital, Ahmedabad, Ex.52.

(xiii) P.W.13, Girishkumar Ambalal, Patel, Investigating Officer, Ex.60.

6.7. The prosecution has also produced a number of

documents and relied upon the contents of the same. They are as under:

(i) Note of muddamal sent to FSL – Ex.26.

(ii) FSL Report, Ex.28.

(iii) Serological report, Ex.29.

(iv) Inquest panchnama, Ex.30.

(v) Panchnama of place of incident, Ex.31.

(vi) Complaint, Ex.35.

(vii) Panchnama of the person of the accused, Ex.38.

(viii) Panchnama of seizure of the cloth of the deceased, Ex.39.

(ix) Panchnama of the person of the deceased drawn when the deceased was alive i.e., on 11.5.1984, Ex.45.

(x) Post-mortem note of deceased Gagjibhai Punabhai, Ex.53.

(xi) Dr. Chhaganlal Kanjibhai, Medical Officer of Referral Hospital, Vallbhipur was examined as a defence witness to prove the injuries sustained

by Mavjibhai Shamabhai, original accused No.5, Ex.64.

(xii) Certificate of the injuries on the body of original accused No.5, Mavjibhai Shamabhai, Ex.65, issued by the doctor.

6.8. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their further statement they denied the prosecution case in toto.

6.9. It is important to note that accused No.1 not only denied the prosecution case in toto but also filed written statement at Ex.61, wherein he explained the circumstances under which he inflicted one blow with sickle (danti) which was lying in a corner of the house of deceased

Gagjibhai, in exercise of right of his self-defence, when Gagjibhai attempted to assault him with dharia.

6.10. So far as accused No.5 is concerned, he in his further statement recorded under Section 313 of the Code stated that at the relevant time deceased Gagjibhai was assaulting Ghanshyam, son of A-1 in his court-yard. Therefore he along with A-1 went there and asked Gagjibhai not to assault Ghanshyam. At that time Gagjibhai inflicted dharia blows on him which resulted in injuries on his head as well as leg. A-1 tried to intervene and save A-5 and at that time Gagjibhai rushed towards A-5 to assault him. As A-5 had received injuries on his head and leg, he was admitted in Referral Hospital, Vallbhipur where he was treated by Dr. Chhaganlal Kanjibhai. A-5 sought permission from the trial Court to examine the doctor who examined and treated him in Referral Hospital. On getting such permission, to prove

the injuries sustained by him, A-5 examined Defence Witness No.1, Dr. Chhaganlal Kanjibhai, at Ex.64.

In short, the case pleaded by them in their further statement recorded as per requirement of section 313 of the Code was the total denial of the prosecution case or the theory of self-defence, as the case may be.

6.11. On appreciation, evaluation, analysis and scrutiny of the evidence adduced and produced by the parties, the learned trial Judge came to the conclusion that the prosecution has not been able to establish the complicity of the accused in committing murder of Gagjibhai. The learned trial Judge also came to the conclusion that evidence on record was not sufficient to constitute an offence to punish the accused under sections 147, 148, 149, 323, 325 or 302 of the IPC. For coming to the said conclusions, the

learned trial Judge considered the following aspects:

(a) Genesis of the prosecution case was highly doubtful.

(b) The first informant, widow of deceased Gagjibhai, who was an eye witness, had suppressed the true origin of the occurrence.

(c) The prosecution could not prove the injuries sustained by A-5- Mavjibhai.

(d) The plea of A-1 that he inflicted one blow on the head of the deceased Gagjibhai with sickle which was lying in a corner of the house of deceased Gagjibhai in exercise of his self-defence was more probable and plausible.

6.12. On the aforesaid premises, the learned trial Judge recorded the finding of not guilty against the accused and resultantly he acquitted the accused of the offence with which they were charged, giving rise to instant appeal at the

instance of the State of Gujarat.

7. Mr. KP Raval, learned APP for the appellant, State of Gujarat, has submitted that there is ample evidence on record to come to the conclusion that the accused had formed an unlawful assembly with common object to assault Gagjibhai and in furtherance of their common object, all of them, armed with deadly weapons, went to the house of Gagjibhai and assaulted him with dharia on his head and with a stick on Savitaben, the complainant, on various parts of her body, as a result of which Gagjibhai received fatal injuries whereas Savitaben received grievous injuries. According to him, to prove the complicity of the accused, the prosecution has examined in all four eye witnesses who have given a correct account which is capable of proving complicity of the accused in commission of the offence. It is true that they are near and dear relatives of deceased Gagjibhai. Their presence

at the scene of occurrence was very natural as the incident had taken place near the house of deceased Gagjibhai. Mr. Raval has further submitted that it is settled principles of law that merely because the eye witnesses happen to be relatives of the deceased, their testimony cannot be thrown overboard. He has also emphasised that there is a motive behind the crime. As Gagjibhai saw Ghanshyam, son of A-1 cutting the bushes on the fence of his house, he reprimanded Ghanshyam and told him to leave the place immediately. Therefore, with a view to take revenge for the reprimand of the deceased, they assembled with a common object to teach Gagjibhai a lesson and a fatal blow was inflicted by A-1 on the head of Gagjibhai. Therefore, according to Mr. Raval, learned APP, the order of acquittal of A-1 for the offence punishable under Section 302 of the IPC is illegal and improper and requires to be quashed and set aside by allowing the appeal filed by the appellant – State of Gujarat

and thereby holding A-1 guilty of the offence punishable under Section 302 of the IPC and accordingly he may be punished. He, therefore, urged to allow the appeal filed by the appellant – State of Gujarat.

8. Per contra, Mr. Sunil Patel, learned advocate of A-1, has submitted that the prosecution has suppressed the genesis of the crime and the injuries caused to A-5 have not been explained, which defect is fatal to the prosecution case. So far as so-called four eye witnesses including the complainant is concerned, they are near and dear relatives of deceased Gagjibhai and, therefore, they have not given the correct account of the crime as to how and in what manner the incident has taken place. According to him, the accused were not aggressors. They only went to the scene of occurrence for rescuing Ghanshyam, son of A-1 who was being beaten by Gagjibhai after confining him in the court-yard of his house and when they

reached there, Gagjibhai assaulted A-5 with a dharia as a result of which A-5 received injuries. Thereafter Gagjibhai tried to assault A-1 also but A-1 could luckily save himself from the blow. When A-1 felt that his life is in danger, he took a sickle which was lying in the corner of the house and in his self-defence, inflicted a blow with the said sickle, which hit on the head of Gagjibhai as at that point of time it was a question of survival. Therefore, according to him, A-1 has exercised right of his self-defence to the limit so as to protect himself from the assault at the hands of Gagjibhai because at the relevant time Gagjibhai was having dharia in his hand and if A-1 had not inflicted the sickle blow then he would have been killed by Gagjibhai with the dharia. He has also emphasised that the aforesaid story was pleaded by A-1 in his further statement. According to him, it is a settled principle of criminal jurisprudence that when the explanations and

assertions with regard to the conduct of the accused offered by him in his written statement tendered while recording his further statement though are not proved they should ordinarily be accepted unless the circumstances indicate that they are false. It is also asserted by Mr. Patel that the prosecution has not explained the injuries sustained by A-5. In the said incident, A-5 had also received injuries. However, the prosecution did not take pains to collect evidence in this regard. Therefore, A-5 had to examine the doctor who examined and treated him for the said injuries, in his defence as D.W.1. A-5 has also lodged a complaint against Gagjibhai which fact has been admitted by the investigating officer in his evidence. However, the prosecution has not produced the said complaint on record. This shows that the prosecution has suppressed the genesis of the crime as well as not explained the injuries caused to A-5 which is fatal to the prosecution case. On the aforesaid

premises, it is submitted by Mr. Sunil Patel that the impugned judgment and order of acquittal recorded by the learned trial Judge does not call for any interference of this Court.

8.1. In support of the aforesaid contention, Mr. Sunil Patel, learned advocate of the accused, has relied upon the following decisions of the Supreme Court:

(i) Lakshmi Singh and others v. State of Bihar, AIR 1976 SC 2263;
(ii) Chandu v. State of Maharashtra, (2002) 9 SCC 408;
(iii) Govindbhai M. Raval v. The State of Gujarat, 1997 (2) GLH 302.

8.2. Mr. Sunil Patel, learned advocate of the accused, has drawn the attention of this Court to the principle which governs and regulates the hearing of appeal by the High Court against an

order of acquittal passed by the trial Court and according to him, in an acquittal appeal, if other view is possible, then also the appellate court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

8.3. On the aforesaid premises, he contended that the appeal lacks merit and deserves to be dismissed and, therefore, he prayed that the appeal may be dismissed.

9. We have considered the submissions advanced by Mr. KP Raval, learned APP for the appellant – State of Gujarat and Mr. Sunil C. Patel, learned advocate for A-1 at length and in great detail. We have also perused the impugned judgment and order and the paper book containing testimonial

collections. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and reread by the learned advocates for the parties with reference to broad and reasonable probabilities of the case.

10. The fact that Gagjibhai died a homicidal death is not in dispute. In this connection, the prosecution has examined P.W.12, Dr. Rathindra B. Deshmukh, at Ex.52, which is on page 134 of the compilation. He has, inter alia, testified that at the relevant time he was Associate Professor, Medicine Department, Civil Hospital, Ahmedabad. He has testified that on 17.5.1984, dead body of Gagjibhai was brought to him by Head Constable of Shahibaug Police station at about 12 noon for post-mortem examination. He started post mortem at 12.10 P.M. and completed it at 1.15 P.M. According to him, cause of death of Gagjibhai was shock as a result of head injury sustained by

him. According to him, all the injuries were ante-mortem and the death had occurred about 12 hours prior to the post-mortem examination. Post-mortem report is produced on record which is at Ex.53.

10.1. In view of the aforesaid oral evidence of P.W.12, Dr. Rathindra Deshmukh, Ex.52 and the autopsy report at Ex.53, there is no difficulty in coming to the conclusion that Gagjibhai died a homicidal death and accordingly it is held that Gagjibhai had died a homicidal death.

11. Having held that deceased Gagjibhai died a homicidal death, the next question that falls for our determination is as to whether A-1 had inflicted the blow on the deceased with an intention to cause his death or he has inflicted the blow in his right of self-defence?

12. In this connection, firstly we shall examine

the oral testimony of P.W.4, Savitaben, the first informant and is the widow of deceased Gagjibhai, who has been examined at Ex. 34, which is at page 89 of the compilation. She, in her oral testimony, has stated that Ghanshyam, son of A-1 came to her house for cutting the bushes at the fence adjacent to her house. Her husband Gagjibhai saw this and he reprimanded Ghanshyam and asked him to go away immediately. Thereupon Ghanshyam abused her husband. Her husband again reprimanded him and warned him that he would be beaten if he stayed there any further. During this altercation, mother of Ghanshyam informed about this alteration to the accused persons. Therefore, all the accused persons came there. A-1 was having a dharia in his hand and remaining 5 persons were having sticks in their hands. In all six persons were there. They rushed to the courtyard of deceased Gagjibhai. A-1 inflicted a blow with the dharia on the head of her husband and A-5 inflicted sticks blow on her. As a

result of dharia blow given by A-1 on the head of her husband, he fell down. She also fell down on receiving stick blows inflicted by A-5. Thereafter all the accused persons inflicted stick blows on her husband and thereafter they fled from the scene of offence. People assembled there and they shifted her and her husband to hospital. Police came to the hospital and took her complaint which is at Ex.35. She has also testified that during the course of treatment, her husband died. She was also cross-examined by the learned advocate of the accused at length and in great detail. She has denied the suggestion that her husband had confined Ghanshyam in the courtyard and beaten him. She has also denied the suggestion that at the time of the incident A-2, A-3 and A-4 were not present. She has also denied the suggestion that A-1 had taken the sickle which was lying in a corner of her house and inflicted injury on the head of her husband in his self-defence.

13. Similar is the evidence of P.W.8, Duda Bhagwan, resident of village Datretia and known to the accused as well as the injured, at Ex.42, which is at page 114 of the compilation as well as P.W.9, Tarsibhai Karamsibhai, a resident of village Datretia and known to the accused as well as the injured whose evidence is recorded at Ex.43, which is at page 117 of the compilation. Their evidence is more or less mere reiteration of the version of P.W.4, Savitaben Gagjibhai, in her evidence.

14. On reappreciation of the evidence of P.W.4, P.W.8 and P.W.9, it is clear that they are near and dear relatives of deceased Gagjibhai. So far as P.W.4 is concerned, she is the widow of deceased Gagjibhai whereas P.W.8 and P.W.9 are neighbours as well as relatives of the deceased Gagjibhai.

15. It is also a fact that in the very incident, A-5 had also received injuries and, therefore, he had remained as an indoor patient at Referral Hospital, Vallbhipur. In this connection, D.W.1, Dr. Chhaganlal Kanjibhai was examined at Ex.64. He has, inter alia, testified that on 9.5.1984 he was on duty at Referral Hospital, Vallbhipur and at night 9.30 injured Mavjibhai Shamabhai was brought in the hospital with police yadi. He examined him and gave him preliminary treatment. He found two injuries on Mavjibhai Shamabhai. One was on his head whereas the other was on his leg. A-5 had also stated before him that he received those injuries in a scuffle. He remained in the hospital as indoor patient for two days and thereafter he was discharged from the hospital. He has issued a certificate to that effect which is at Ex.65.

16. Now the question that arises for determination of this Court is as to whether A-5

received those injuries in the same incident or not? According to the defence version, A-5 had also filed a complaint against Gagjibhai as Gagjibhai had inflicted injuries on him with dharia.

17. The prosecution has examined P.W.13, Girishkumar Ambalal Patel, Investigating Officer, Ex.60, which is at page 140 of the compilation. Though the complaint filed by A-5 against Gagjibhai is not on record, the factum of filing of complaint by A-5 against Gagjibhai has been admitted by him. He has, inter alia, testified in his evidence that A-5 had filed complaint against Gagjibhai which was recorded vide CR No.I-61 of 1984 but as Gagjibhai died, charge-sheet could not be filed.

18. It is also required to be noted that as per the prosecution case, A-1 has produced dharia and, therefore, a recovery panchnama was made.

After recovering the dharia it was not sent to FSL. Both the panch witnesses have not supported the case of prosecution. Therefore, recovery of dharia from A-1 has become doubtful.

19. So far as the defence of A-1 is concerned, he has not disputed the occurrence of the incident but he has disputed the way and the manner in which the incident has occurred.

20. In this connection, while recording his further statement, A-1 has tendered written statement which is on record at Ex.61 wherein it has been stated by him that at the time of incident, deceased Gagjibhai was assaulting his son Ghanshyam in the court-yard of his house and therefore he and Mavjibhai tried to intervene. When they reached there Gagjibhai inflicted two blows with dharia on Mavjibhai on his head and leg. Mavjibhai thereafter went away from that place. A-1 told Gagjibhai that he should not

assault Ghanshyam and at that time Gagjibhai turned towards him and tried to inflict a blow with dharia but somehow he saved himself and averted the blow from falling on him. Gagjibhai again tried to inflict blow with dharia. At that time A-1 felt that it was either him or Gagjibhai who will survive the next moment. He, therefore, picked up a sickle which was lying in a corner of the house of Gagjibhai and wagged it in his self-defence so as to ensure that Gagjibhai would not assault him further, but in that process, unfortuantely, the sickle hit Gagjibhai. According to A-1, had he failed in exercising his right of self-defence, he would have been killed by Gagjibhai.

21. On over all appreciation of the prosecution case, following points can be culled out:

(a) The incident in question occurred on the spur of a moment. There was no preplanning or

premeditation at the end of the accused persons. There was free fight amongst the accused and deceased. The incident occurred because Gagjibhai reprimanded Ghanshyam, son of A-1, who was cutting the bushes on the fence of the house of Gagjibhai and asked him to go away else he would be beaten. Upon this reprimand, Ghanshyam started abusing Gagjibhai. Thereafter Gagjibhai started assaulting Ghanshyam in his court-yard. This incident was witnessed by the mother of Ghanshyam, who in turn informed A-1 and thereafter the accused persons reached at the house of Gagjibhai. When A-5 tried to intervene, Gagjibhai inflicted blows with dharia on the head and leg of A-5 resulting into injuries to him and after receiving those injuries, A-5 left the scene of occurrence.

(b) The factum of assault by deceased Gagjibhai to A-5 is corroborated by the injuries sustained by A-5, Mavjibhai, by adducing evidence of D.W.1,

Chhaganlal Kanjibhai, Medical Officer, Referral Hospital, at Ex.64. The prosecution is conspicuously silent on this aspect and has in a very vague manner made an attempt to explain those injuries on A-5 Mavjibhai.

(c) The complaint lodged by A-5, Mavjibhai against Gagjibhai first in point of time was registered at Vallbhipur Police Station vide CR No.I-61 of 1984 and this fact is proved by the evidence of P.W.13, Girishkumar Patel, at Ex.60.

(d) The prosecution on its own did not produce the injury certificate of A-5, Mavjibhai but the certificate with respect to the injuries sustained by A-5 was brought on record and were proved through the defence witness Dr. Chhaganlal Kanjibhai, vide Ex.64. This was a deliberate act on the part of the prosecution.

(e) The prosecution has also not produced the

complaint lodged by A-5, Mavjibhai against deceased Gagjibhai but this fact has been proved by the evidence of P.W.13, Girishkumar Ambalal Patel, investigating officer, Ex.52.

22. In Lakshmi Singh's case, the Supreme court has observed as under:

> "In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:
>
> (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case. (See Mohar Rai v. State of Bihar AIR 1968 SC 1281 and AIR 1975 SC 1674).

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where

> the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries (See State of Gujarat v. Bai Fatima, AIR 1975 SC 1478).”

23. In Chandu's case, (supra) the Supreme Court has observed that the prosecution has suppressed the material fact and concealed the origin of the fight and not explained the injuries sustained by the accused. On the said fact the Supreme Court has held that the prosecution has not come with clean hands and the evidence of the witnesses produced by it does not inspire confidence.

24. In Govindbhai's case (supra) a Division Bench of this Court while deciding the appeal against the order of conviction wherein both the accused received injuries during the scuffle which was not explained by the prosecution and therefore it

was held that the prosecution has suppressed the genesis of the incident and witnesses are related and interested and the defence of the accused is more probable and therefore conviction of the accused was set aside.

25. Applying the principles laid down by the Supreme Court as well as this Court in the above referred to judgments to the facts of the present case, at the risk of repetition, be it stated that the prosecution has not come with clean hands. The witnesses examined by the prosecution are near and dear relatives and the prosecution has suppressed the genesis of the crime. The prosecution has not explained the injuries sustained by the accused. Therefore no reliance can be placed upon their testimony whereas the explanation offered by the accused in his written statement is more probable and plausible and as per the said written statement A-1 in his right of self defence, inflicted a blow on the head of

deceased Gagjibhai, with a sickle which was lying in a corner of the court-yard of the house of Gagjibhai. Therefore, it has to be held that accused were not the aggressors or assailants first in point of time and they have reacted to the assault of the deceased Gagjibhai in their self-defence. A-1 took the sickle which was lying in a corner of the courtyard of the house of Gajibhai and wagged it so as to prevent Gagjibhai from assaulting him which unfortunately hit on the head of Gagjibhai and this act of wagging sickle was a clear case of exercise of self-defence by A-1 as at the relevant time Gagjibhai was having dharia in his hand and once he had attempted to strike with it on A-1 which was by luckily averted by him and thereafter Gagjibhai was coming for the next strike with the dharia. Therefore, according to us, the accused has not exceeded the limit of exercising his right of self-defence.

26. At this stage, it would be also advantageous to refer to the decision of the Supreme Court in the case of Aher Raja Khima v. State of Saurashtra, AIR 1956 SC 217. In the said decision, the Supreme Court has held that there are two important factors in every criminal trial that weigh heavily in favour of an accused person; one is that the accused is entitled to the benefit of every reasonable doubt and the other, an off-shoot of the same principle, that when an accused person offers a reasonable explanation of his conduct, then, even though he cannot prove his assertions, they should ordinarily be accepted unless the circumstances indicate that they are false.

The aforesaid decision of the Supreme Court in the case of Aher Raja Khima (supra) is squarely applicable to the facts of instant case. In instant case also, A-1 has tendered his written submission which is on record at Ex.61

wherein he has explained the circumstances under which he inflicted one blow with the sickle which was lying in a corner of the house of deceased Gagjibhai in exercise of right of his self-defence when Gagjibhai attempted to assault him with dharia. Therefore, according to us, he has given a reasonable explanation of his conduct and the said explanation ordinarily should be accepted unless the circumstances indicate that they are false and in instant case, according to us, they are not false and hence we accept it.

27. In view of the aforesaid evidence, according to us, the finding recorded by the learned trial Judge are absolutely just and proper. We find ourselves in complete agreement with the said finding, ultimate conclusion and resultant order of acquittal as in our view no other conclusion is possible except the one reached by the learned trial Judge.

28. This is an acquittal appeal. The principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court have been very succinctly explained by the Supreme Court in the case of Ajit Savant Majagavi v. State of Karnataka, AIR 1997 SC 3255, as under:

(a) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(b) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(c) Before reversing the finding of

acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.

(d) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

(e) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(f) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court, especially in the witness box.

(g) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

29. In Anokh Singh v. State of Punjab, AIR 1992 SC 598, the Supreme Court has held that in an appeal against acquittal, the High Court should attach greater weight to appreciation of evidence by the trial Judge who had the occasion to watch the demeanour of the witnesses.

30. It is a cardinal principle of criminal

jurisprudence that in an acquittal appeal if other view is possible then also appellate court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable (See Ramesh Babulal Doshi v. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Judge are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

31. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned trial Judge for acquitting the accused. Suffice it to say that the learned trial Judge has given cogent and convincing reasons for acquitting the accused and

the learned APP has failed to dislodge the reasons given by the learned trial Judge and convince this Court to take a view contrary to the one taken by the learned trial Judge.

32. Seen in the above context, we do not find any valid reason or justifiable ground to interfere with the impugned judgment and order acquitting the accused of the offences with which he was charged. Therefore, the appeal lacks merit and deserves to be dismissed.

33. For the foregoing reasons, the appeal fails and accordingly it is dismissed. Accused No.1 is on bail. Therefore, his bail bonds stand cancelled an sureties are discharged.

(A.M. Kapadia, J.)

(S.R. Brahmbhatt, J.)

(karan) ...